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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1928

No. ~~618~~. 21

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

NICK MIHAS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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(33,928)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1928

No. 619

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PETITIONER,

vs.

NICK MIHAS, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Supreme Court of the United States:

Now comes THE CHESAPEAKE AND OHIO RAILWAY COMPANY, petitioner, and respectfully petitions this Honorable Court to grant a writ of certiorari to the Appellate Court of Illinois, First District, and/or to the Supreme Court of Illinois, and to remove therefrom to this Court for review the record in the case lately pending in the Appellate Court entitled: Nick Mihas, appellee, against The Chesapeake and Ohio

Railway Company, appellant, being cause number 32370 on the Docket of the Appellate Court; certiorari denied by the Supreme Court of Illinois on October 23, 1928. (R. 226.)

A duly certified record, including all of the proceedings in the Superior Court of Cook County, Illinois, where the said cause was tried, and in the Appellate Court of Illinois, First District, to which an appeal was taken by petitioner from the judgment of the trial court, and in the Supreme Court of Illinois, in which court a petition for writ of certiorari was filed by the petitioner herein, are filed herewith under separate cover.

Your petitioner represents that it is aggrieved by the final judgment of the Appellate Court of Illinois, First District, and the final order of the Supreme Court of the State of Illinois, entered on the 23rd day of October, 1928, wherein the Supreme Court denied the petition for a writ of certiorari to review the judgment of the Appellate Court; that the matters at issue in the cause are wholly of a Federal nature and are of peculiar gravity and importance, in that the suit was brought to recover damages under the Federal Employers' Liability Act of Congress of April 22, 1908, and Acts amendatory thereof, for injuries to the respondent, Nick Mihas, alleged to have occurred while the said Nick Mihas was in the employ of the petitioner as a section-hand, engaged in interstate commerce, and the several holdings and decisions of the State Courts complained of are believed to be in direct conflict with applicable decisions of this honorable Court upon the questions involved.

Statement of Proceedings.

This action was brought in the Superior Court of Cook County, Illinois, by the respondent, Nick Mihas (sometimes hereinafter called plaintiff), to recover damages for injuries sustained while in the employ of the petitioner (sometimes hereinafter called defendant) as a section-hand engaged in interstate commerce.

At the close of the plaintiff's case in the trial court, and again at the close of all of the evidence offered in the case, defendant made its motions for a directed verdict in its favor, on the ground that the plaintiff had failed to prove any actionable negligence against the defendant, and on the further ground that the plaintiff assumed the risk. The motions were denied and on April 7, 1927, the jury returned a verdict for the plaintiff in the sum of $20,000 (Rec., 47). The defendant made its motion for a new trial, which, on April 16, 1927, was denied. Defendant's motion in arrest of judgment was overruled, and judgment entered by the trial court in the sum of $20,000 (Rec., 48). An appeal was prayed to the Appellate Court of Illinois, First District, and allowed, and thereafter, that court, on the 20th day of June, 1928, affirmed the judgment (Rec., 2). A petition for rehearing was filed in the Appellate Court by petitioner, which was entertained, but on the 5th day of July, 1928, the rehearing was denied (Rec., 2). Thereafter, on the 6th day of September, 1928, a petition for writ of certiorari was filed in the Supreme Court of Illinois by petitioner, which, on the 23rd day of October, 1928, was denied (Rec., 226).

The Supreme Court of Illinois having denied the petition for certiorari, the judgment of the Appellate Court became final.

> Section 120, Chapter 110, Cahill's Revised Statutes of Illinois, 1927 (quoted in Appendix).

Since it was discretionary with the Supreme Court of Illinois to review the decision of the Appellate Court on certiorari, and the petition for certiorari was denied, a writ of certiorari from this apparently should be addressed to the Appellate Court of Illinois, First District, and the limit of time for making such application here runs from the date when certiorari was refused by the Supreme Court of Illinois, the highest tribunal in that state in which a decision in this cause can be had, on October 23rd, 1928.

> American Railway Express Company *v.* Levee, 263 U. S., pages 19 and 20.

It should be noted, however, that the accompanying record is certified by the Supreme Court of Illinois.

Specifications of Error.

The judgment in this case has been awarded and affirmed against the petitioner under an erroneous interpretation of the Federal Employers' Liability Act as applied to the facts in this case, in the following particulars:

1. Error in denying defendant's motion for a directed verdict on the ground that the plaintiffs failed to prove his cause of action for right of recovery under the Act.

2. Error in denying defendant's motion for a directed verdict, made at the close of all of the testimony, on the ground that under all the evidence in the case no negligence on the part of the defendant was proved.

3. Error in denying defendant's motion for a directed verdict for the reason that under the Act the plaintiff assumed all risk of injury to himself in attempting to pass over or between the freight cars, resulting in his injury.

4. Error on the part of the trial court in admitting improper evidence on behalf of the plaintiff over the objections of the defendant, and failure to strike out this evidence on the motion of the defendant.

5. Error on the part of the Appellate Court of Illinois, First District, in affirming the judgment of the trial court, and of the Supreme Court of Illinois in denying defendant's petition for certiorari.

Statement of Facts.

The injury to Mihas occurred on March 16, 1927, at about ten minutes to seven o'clock in the morning, in the defendant's yards at Peru, Indiana (Rec., 95). The tracks in these yards ran in an easterly and westerly direction, bounded on the north by Canal Street and on the south by Wabash River. There were five tracks in the yard, the main track, and switching lead and three house or team tracks. The northerly track was team track number 3, on which the accident occurred. About twenty-five feet north of this team track there was a small house, in which the plaintiff

lived, furnished to him by the company rent free (Rec., 128-130). Mihas had been in the employ of the company for fourteen years, and had lived in the house alongside of the team track for about four years prior to the date of the accident. He used a small speeder car, operated by hand, in going up and down the defendant's line to perform his duties in caring for the switch lamps and lights along the right of way. This speeder car was usually located, as it was on this occasion, in an old box car on the south side of the yards and it was necessary for Mihas to cross the tracks in order to get to it (Rec., 92).

Mihas testified that when he came out of the back door of his house to start to work he looked to one side and the other, did not see or hear any train or shifting cars. He went directly therefrom and, in order to cross the yard to get his speeder car, attempted to climb over a coal car standing with other cars on team track number 3 (Rec. 96), at a point where there was no established crossing, and just at that moment a string of nine cars which had been switched in on the team track struck the standing cars, causing Mihas to fall between the cars (Rec. 97), with the result that his arm was crushed and afterwards amputated.

Mihas obviously could have crossed the tracks at other points without the necessity of climbing over or going between the standing cars, though doubtless not so conveniently (Rec. 117, 118, map opposite p. 128, 128, 129, 146).

This switching operation was effected by what is called a "flying switch"—that is, the engine was cut

loose from the cars after a sufficient momentum had been obtained, then ran along the main track, while the string of cars following were shunted on team track number 3 (Rec. 190-191). Although there was testimony that the impact from the moving car striking those at rest was quite severe (Rec. 70-71) the speed of the cars when shunted was no more than four or five miles per hour, the usual speed for that operation (Rec. 177, 196, 198). Those making the switching movement had no knowledge of the presence or movements of Mihas (Rec. 177, 195). He had no regular time for beginning his work (Rec. 91). It was customary for switching to be done on these tracks at the time of day the injury occurred—a custom with which Mihas was familiar (Rec. 111-112).

Among the cars standing on team track number 3 was a loaded coal car from which some men had been unloading coal shortly prior to the switching movement. There was testimony upon which plaintiff's case was based, admitted over defendant's objection, to the effect that it was customary for trainmen to notify persons unloading freight from the cars liable to be affected when a switching movement of the character made here was contemplated (Rec. 59, 72-73), though it did not appear that the men who had been unloading coal were in any danger at the time of the switching movement here—they had already ceased unloading and were moving away with their truck (Rec. 57, 70, 75, 101, 112, 113). This customary warning was exclusively for persons engaged in unloading cars and not for employes (Rec. 166-167). There was no such notice given in this instance and Mihas,

who had observed these men in the act of leaving, states he heard no such notice given and relied upon that as justifying his course in attempting to climb over the car (Rec. 98-99) though he made no inquiry nor was he otherwise advised as to whether or not these men had been in fact notified or warned (Rec. 113, 116).

Summary of Argument.

The Appellate Court, in its opinion, said (Rec. 10):

> "So far as the public is concerned, and by that we mean people dealing with the defendant in unloading cars at the point in question, we are fully of the opinion that the flying switch, without any warning to those so engaged was a negligent operation. It is urged by counsel for defendant that this may be true, in so far as the public is concerned, but that it owed no duty to the plaintiff and that, even though there may have been a custom to warn teamsters, there was no obligation to warn plaintiff, as he was an employee of the defendant and not entitled to the same warning to which the public was entitled. It is urged that the trial court, in permitting evidence as to this custom was in error. We cannot agree with this contention. * * *."

The judgment of the trial court was sustained mainly, if not solely, on the ground that the custom referred to enured to the benefit of Mihas.

The holdings and decisions complained of are believed to have been erroneous for the following reasons:

(1) *The failure to give Mihas notice or warning of the switchiny movement was not negligence as to him and he assumed the risk thereof* (Aerkfetz *v.* Humphreys, 145 U. S. 418; Toledo, etc., R. Co. *v.* Allen, 45 Sup. Ct. 215);

(2) *The making of the "flying switch" was not negligence as to Mihas* (Toledo, etc., R. Co. *v.* Allen, *supra*), and

(3) *Even if there were a duty to give notice or warning of the switching operation to others differently situated from Mihas, a breach of that duty was not as to him actionable* (St. Louis, etc., R. Co. *v.* Conarty, 238 U. S. 243).

Jurisdiction of This Court.

The controlling question raised by petitioner in the trial court was that, as a matter of law, the evidence is not sufficient to sustain a finding that petitioner's negligence was the proximate cause of the injury complained of; that Mihas assumed the risk and that its motion for a directed verdict should have been granted. The jurisdiction of this court to review the judgment on certiorari seems clear.

Chicago, etc., R. Co. *v.* Coogan, 271 U. S. 472;
Chesapeake, etc., R. Co. *v.* Nixon, 271 U. S. 218.

Prayer.

For the purpose of correcting the errors complained of, and to the end that the rights and liabilities of the

petitioner may be determined in accordance with the Federal law, your petitioner respectfully prays that a writ of certiorari may be issued under the seal of this court, directed to the Appellate Court of Illinois, First District, and/or to the Supreme Court of the State of Illinois, commanding them and each of them to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Appellate Court of Illinois, First District, and/or the Supreme Court of Illinois, in the within cause (Minneapolis &c., R. Co. *v.* Rock, — U. S. —, No. 454, October term, 1928), to the end that the judgment of the said Appellate Court of Illinois, First District, and/or the Supreme Court of Illinois, may be reviewed by this Court as provided by law, and that your petitioner may have such other relief as to this Court may seem appropriate, and that the judgment of the said Appellate Court of Illinois, First District, and/or the Supreme Court of Illinois, may be reversed by this Honorable Court.

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY,
Petitioner.

By DAVID H. LEAKE,
WILLIAM G. WISE,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Since the case presented is admittedly governed by the provisions of the Federal Employers' Liability Act (Rec. 212, 219), "rights and liabilities depend upon it and applicable principles of common law as interpreted and applied in Federal Courts; and negligence is essential to recovery."

New Orleans & N. E. R. Co. *v.* Harris, 247 U. S. 367, 371;
Chicago, M. & St. P. R. Co. *v.* Coogan, 271 U. S. 472.
Toledo, etc., R. Co. *v.* Allen, 48 Sup. Ct. 215.

No recovery should be allowed in this case, upon the facts shown in evidence, for the following reasons:

(1) *The failure to give Mihas notice or warning of the switching movement was not negligence as to him, and he assumed the risk thereof;*

(2) *The making of a "flying switch" was not negligence as to Mihas; and*

(3) *Even if there were a duty to give notice or warning of the switching operation to others differently situated from Mihas, a breach of that duty was not, as to him, actionable.*

(1)

The Failure to give Mihas Notice or Warning of the Switching Movement was not Negligence as to Him, and He Assumed the Risk Thereof.

The plaintiff had been, for a number of years, thoroughly familiar with the manner of the switching

operations in these yards. The employes of the defendant had no reason to anticipate or believe the plaintiff was in or about the cars, or would subject himself to danger in attempting to cross over or between cars. Under these circumstances it was not incumbent upon the defendant to give him notice or warning of the switching movement, and in attempting to pass between the cars under the circumstances, the plaintiff assumed the risk of the danger incident thereto.

In Toledo, etc., R. Co. *v.* Allen, 48 Sup. Ct. 215, *supra*, this court, through Mr. Justice Butler, said, at page 217:

> "And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. Aerkfetz *v.* Humphreys, *supra*.
>
> In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him."

Chesapeake, etc., R. Co. *v.* Nixon, 271 U. S. 218;

Aerkfetz *v.* Humphreys, 145 U. S. 418;

Davis *v.* Phila., etc., R. Co., 276 Fed. 187;
Krysiak *v.* Penn. R. Co., 270 Fed. 758;
Hines, Dir. Gen., *v.* Jasko, 266 Fed. 336;
Connelly *v.* Penn. R. Co., 228 Fed. 322.

(2)

The Making of a "Flying Switch" was not Negligence as to Mihas.

The Appellate Court intimates, rather than decides, that the making of the "flying switch" by the trainmen was a negligent act of which Mihas could complain.

The only relevance of the method of switching concerns the violence of the resulting impact upon the standing cars. If it be conceded that the cars went in on the team track at a speed sufficient to strike the standing cars with more force than was reasonably requisite and that the mere violence of the impact was the proximate cause of the plaintiff's injury, these facts would not of themselves constitute negligence. Mihas was in a place where he had no right to be and his presence there was unknown and unsuspected.

In St. Louis, K. C. & C. R. Co. *v.* Conway, 156 Fed. 234, it was held:

> "An act, which caused an injury to another not foreseen, and which could not reasonably have been anticipated, does not give a right of recovery for such injury on the ground of negligence; and a railroad company cannot be held liable for an injury to a brakeman who was riding on the pilot of the first of two engines coupled together, where he had no right to be, conceding as claimed, that it was caused by the act

> of the engineer of the rear engine in starting his engine suddenly and causing it to jar the one in front; such engineer having no knowledge of the brakeman's position on the pilot."

After discussing the evidence and citing authorities, the court said, on page 239:

> "With such reiteration that the necessity of repeating it almost excites impatience, the courts have asserted, and consistently held, that when the servant, of his own volition and for his own convenience, assumes a dangerous position, not intended by the master, in which to perform his work, he is without just complaint against the master if injury thus come to him."

See also Hinson *v.* Atlantic, etc., R. Co., 172 N. C. 646 (90 S. E. 772).

Nor, in any other respect, is there any warrant for the conclusion that the so-called "flying switch," as made here, was negligent operation as far as the plaintiff was concerned.

> Toledo, St. L. & W. R. Co. *v.* Allen, 48 Sup. Ct. 215, *supra;*
> Lord *v.* Boston, etc., R. Co. (N. H.), 65 Atl. 111.

(3)

Even if There Were a Duty to Give Notice or Warning of the Switching Operation to Those Differently Situated from Mihas, a Breach of That Duty was not as to Him Actionable.

Even if it were true that, under the evidence, there was a duty to the men unloading cars to give notice or

warning to them of the switching operation, which is not believed to be the case, since these men had finished unloading and were leaving the premises (Rec. 57, 70, 75, 101, 112, 113)—under applicable decisions of this honorable court, a breach of that duty resulting in an injury to an employe such as here would not as to him be actionable.

St. L. and San Fran. R. *v.* Conarty, 238 U. S. 243, 249;
Chesapeake and Ohio R. Co. *v.* Nixon, 271 U. S. 218.

The general rule is stated in 39 *C. J.*, page 879, as follows:

> "The general rule as to precautions against known or apparent dangers apply in cases of injuries to servants crossing tracks or yards. Where a servant when crossing a track or yard is not engaged in the performance of any work which demands his attention it is his duty to see and hear approaching trains, and to give his undivided attention to what is taking place about him, and if he is injured by reason of a non-observance of this requirement, he cannot recover. In these circumstances, the servant is held to the same measure of care in looking and listening for approaching trains as any other person lawfully passing over the track. He has no right to rely on a custom to give warnings and signals, given only to those servants actively engaged in the performance of services."

See also

Cincinnati, etc., R. Co. *v.* Swann, 160 Ky. 458 (169 S. W. 886);
Williams *v.* Chicago, etc., R. Co. 135 Ill. 491;
Lord *v.* Boston, etc., R. Co., 65 Atl. 111, *supra.*

The Appellate Court of Illinois, in its opinion apparently announces a doctrine in contravention of this principle and relies upon certain Illinois cases in support of it.

In view of the decisions in the case of Williams *v.* Chicago, etc., R. Co., 135 Ill. 491, *supra* (one of the cases cited in the opinion in the *Conarty case*), it may well be doubted if the Illinois doctrine, in this respect, previously announced, is in anywise different from the Federal rule on the subject. However that may be, it is clear that the Federal rule governs here.

Central Vermont R. Co. *v.* White, 238 U. S. 507;
New Orleans & N. E. R. Co. *v.* Harris, 247 U. S. 367, *supra;*
Chesapeake and Ohio R. Co. *v.* Nixon, 271 U. S. 218, *supra.*

This evidence should not have been admitted, nor should potency have been given it as evidence tending to show negligence.

For the reasons stated and upon the authorities cited, it is respectfully submitted that the judgment of the Appellate Court of Illinois, First District, and/or the Supreme Court of Illinois, should be reversed.

DAVID H. LEAKE,
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Attorneys for Petitioner.

APPENDIX.

Extract from Section 120, Chapter 110, Cahill's Revised Statutes of Illinois, 1927.

"In all cases in which their jurisdiction is invoked pursuant to law, except those wherein appeals and writs of error are specifically required by the Constitution of the State to be allowed from the Appellate Courts to the Supreme Court, the judgments or decrees of the Appellate Courts shall be final, subject, however, to the following exceptions: (1) In case a majority of the judges of the Appellate Court or of any branch thereof shall be of opinion that a case (regardless of the amount involved) decided by them involves a question of such importance, either on account of principal or collateral interests, as that it should be passed upon by the Supreme Court, they may in such cases grant appeals to the Supreme Court on petition of parties to the cause, in which case the said Appellate Court shall certify to the Supreme Court the grounds of granting said appeal. (2) In any such case as is hereinbefore made final in the said Appellate Courts it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case, and with like effect, as if it had been carried by appeal or writ of error to the Supreme Court:" * * *